

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of) PP Docket No. 93-253
)
Implementation of Section 309(j))
of the Communications Act -)
Competitive Bidding)

COMMENTS ON EMERGENCY PETITION FOR WAIVER

Independent Cellular Consultants PCS, Inc. ("ICCPCS"), by its attorneys and pursuant to the Commission's Public Notice regarding the captioned proceeding (DA 95-651, released March 29, 1995), hereby submits the following comments on the March 28, 1995 "Emergency Petition for Waiver" ("Petition") filed by Telephone Electronics Corporation ("TEC"):

ICCPCS's Interest in This Proceeding

ICCPCS is engaged in the business of providing consulting and coordination services to individuals and entities planning to file applications for, and participate in the auctions for, PCS authorizations in the Entrepreneurs' Blocks ("Blocks C and F"). Any partial or complete resolution of TEC's waiver request will impact directly upon the activities, qualifications, and competitive postures of ICCPCS and its clients. ICCPCS and its clients also will be indirectly impacted by any influence the Commission's action on TEC's waiver request may have upon the resolution of TEC's pending appeal (Case No. 95-1015, United States Court of Appeals for the District of Columbia) ("Appeal"), which Appeal challenges inter alia, the Commission's affording of bidding

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credits and other benefits to designated entities ("DE") on the basis of race or gender.

**TEC Should Be Allowed to Participate
in the Blocks C and F Auctions, But
Not on the Basis of Any Waiver of the
Affiliation Rules**

TEC seeks waiver of the "affiliation" provisions of Section 24.709(a)(1) of the Commission's Rules so as to permit TEC to apply for, and participate in the auctions for, authorizations in Blocks C and F. ICCPCS believes that TEC is correct in asserting that it was the intent of Congress to afford rural telephone companies, such as TEC's operating subsidiaries, the opportunity to acquire set aside PCS authorizations, such as those specified for Blocks C and F. Both Section 309(j)(3)(B) and Section 309(j)(4)(D) of the Communications Act (47 U.S.C. §§ 309(j)(3)(B) and 309(j)(4)(D)) specifically enumerate rural telephone companies among the categories of individuals and entities to whom special opportunity should be provided in the competitive bidding context. Accordingly, ICCPCS believes TEC's subsidiaries should be allowed to participate in the Blocks C and F application and auction proceedings for those eight (8) Basic Trading Areas enumerated in the Petition.

Notwithstanding the foregoing, ICCPCS opposes the grant of the waiver of the "affiliation" provisions of Section 24.709 requested by the Petition. In fact, it must be recognized that TEC now characterizes as a "request for waiver" is either a request for

rulemaking or, at least, a petition for reconsideration of the Commission's Fifth Memorandum Opinion and Order.^{1/}

The Commission already has refused to adopt TEC's recommendation to exempt rural telephone operating companies from the requirements of affiliation with, and attribution of assets and revenues of, their corporate families.^{2/} In doing so, the Commission specifically rejected efforts by TEC and others to have the assets and revenues of each attributable investor evaluated on a separate basis.^{3/} Instead, the Commission found that "[a]ggregating the gross revenues and total assets of all attributable investors in and affiliates of the applicant essential to an accurate size determination, and consistent with the Small Business Administration's (SBA's) approach to similar determinations."^{4/} The Commission also found that such measures were consistent with the eligibility bases utilized by all Federal agencies for contract set asides.^{5/} For the Commission now to "waive" the affiliation or attribution provisions of Section 24.709 would do violence to the premise that all businesses will be

^{1/} Fifth Memorandum Opinion and Order in the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 10 FCC Rcd. 403 (1994) ("MO&O").

^{2/} MO&O, at 418-20.

^{3/} Ibid.

^{4/} Ibid.

^{5/} MO&O, at 418, n. 55.

evaluated according to the same standards and, in turn, will open the flood gates to all those potential applicants who believe their business structures are "unique" and deserving of similar special treatment.^{6/7/}

Accordingly, the Commission cannot grant the waiver request sought by TEC. Instead, it is suggested that the Commission grant TEC a waiver so as to allow TEC's operating subsidiaries to participate in the Blocks C and F application and auction proceedings, as rural telephone companies, without regard to any financial caps. Such a waiver would serve the Congressional intent of providing special opportunities for rural telephone companies without regard to the financial status of those companies.^{8/9/}

^{6/} E.g., travel agencies and publishers of advertising supported publications have long asserted that the nature of their "gross revenues" warrant special consideration under the affiliation and attribution rules.

^{7/} It appears that TEC's claim that it is uniquely situated is in error. On March 29, 1995, Consolidated Communications, Inc. ("CCI") sought leave to intervene in TEC's pending appeal. In support of its motion to the Court, CCI specifically contradicted TEC's claim of uniqueness and asserted that it was similarly situated. PCSG cannot speculate as to how many others, prodded by the subject waiver request, may make similar claims.

^{8/} PCSG recognizes that the Commission may determine that provision for such unrestricted participation by rural telephone companies would more appropriately be the subject of a rulemaking proceeding. However, PCSG believes the statutory mandates regarding rural telephone companies set forth in Section 309(j) of the Act provide more than ample justification for such a rule provision.

**TEC Should Not Be Provided With Any
Small Business Bidding Credits or any
Deferred Payment Benefits**

By the Petition, TEC also seeks to have any waiver of the "affiliation" provisions of Section 24.709(a)(1) operate so as to afford its affiliates the ability to receive both the ten percent (10%) auction bidding credit provided to "small businesses" and the deferred payment benefits available to those who fall within the financial caps. While, as noted above, ICCPCS believes it appropriate for rural telephone companies to be afforded the opportunity to participate in the Blocks C and F auctions for BTA's in their service areas, ICCPCS opposes any waiver which ignores the true financial status of any applicant, including rural telephone companies. It has been the Commission's consistent position that bidding credits and deferred payment plans should be afforded only to those applicants and auction participants who are economically disadvantaged by virtue of their statuses as small businesses, women or members of minority groups. Even those falling within these categories may be deprived of their ability to obtain bidding credits and other financial advantages by virtue of the true economic status of their respective affiliates. Although TEC's rural telephone operating subsidiaries should be allowed to participate in Blocks C and F on the basis of congressional intent,

^{2/}(...continued)

^{2/} In this context, the Commission may also wish to determine whether all women and minority group members should be allowed to participate, without financial incentives, in Blocks C and F, while using the financial caps and benchmarks to determine whether, and to what extent, an applicant is entitled to financial incentives.

those companies, and their affiliates, including TEC, are not entitled to exceed the financial caps imposed for determining qualification for bidding credits and deferred payment plans. This is but one of the reasons why ICCPCS opposes the waiver of the affiliation or attribution provisions of Section 24.709. A waiver of those provisions for one purpose will put the Commission upon a slippery slope where it will be unable to limit the effects of a waiver granted for a limited purpose.

Again, ICCPCS recommends that the Commission allow participation in Blocks C and F by all rural telephone companies on the basis of the congressional intent reflected in Section 309(j) of the Act, without regard to financial standards. Such an arrangement would continue to allow those rural telephone companies which are truly economically disadvantaged to retain the financial benefits of the current bidding and payment structures, without affording such benefits to those rural telephone companies which exceed the financial caps.

**The Commission Must Condition Any Waiver or
Rule Change Adopted in Response to the
Petition Upon the Final Resolution of All
Issues Placed Before the Court by TEC**

TEC asserts that one of the public interest benefits to be obtained by a grant of its requested waiver will be the termination of its pending appeal, and the attendant ability of the Commission to move forward with the Blocks C and F auctions on an expeditious basis.

TEC sought, and has been granted, a stay of the FCC's Blocks C and F application and auction proceedings. The Court based that stay, in substantial part, on TEC's claim to the Court that any participation right, bidding credit, or deferred payment plan afforded a "designated entity" ("DE") on the basis of race or gender is constitutionally impermissible. In this regard, TEC specifically relied upon the unsettled issues presently pending before the Supreme Court in the Adarand case.^{10/} ICCPCS respectfully submits that neither the Commission nor TEC may "settle" TEC's pending appeal unless the Adarand issues potentially affecting all DEs are resolved also.

Since TEC's widely publicized, and presently successful, attempt to obtain a stay of the Blocks C and F proceedings, ICCPCS and its clients have been severely impacted by the stay's chilling effect on potential lenders, investors and strategic partners. The challenge to the financial incentives intended by the Commission to assist DEs has, instead, created an atmosphere of uncertainty which is detrimental to capital formation by DEs.

In order for the Commission to bring rationality and certainty to the structuring and funding of DE applicants, it will not be sufficient for the Commission to merely exchange the requested waiver for the withdrawal of but one challenge to the

^{10/} Adarand Constructors, Inc. v. Pena, 115 S.Ct. 41 (1994) (argued January 17, 1995).

qualifications for participation in the entrepreneurs' blocks.^{11/} Instead, the Commission must assure itself, and all potential applicants for Blocks C and F, that the ground rules for participation in the entrepreneurs' blocks are certain and final. It serves no purpose to resolve, through waiver, the participatory status of a single potential applicant while leaving uncertain, or open to challenge, the statuses of so many other potential applicants. Accordingly, any action the Commission takes with regard to the Petition should be subject to all rules governing participation in the entrepreneurs' blocks becoming final.^{12/} In addition, the Commission should refrain from proceeding with Blocks C or F applications or auctions until such time as all issues affecting those proceedings are finally resolved.

Conclusion

While the Commission should provide appropriate opportunity for rural telephone companies to participate in the Blocks C and F proceedings in their respective BTAs, the specific

^{11/} Even the disposition of the Appeal is rendered uncertain by virtue of (a) the need to obtain the Court's consent to any dismissal, and (b) the presence of third parties seeking to intervene in the Appeal.

^{12/} PCSG unfortunately recognizes that such finality may be impossible to achieve prior to the Supreme Court's issuance of its decision in Adarand. While PCSG is loathe to see the entrepreneurs' blocks proceedings delayed, it does believe that the virtual certainty of a decision issuing in Adarand before the end of the Supreme Court's present term in June makes deferral of Blocks C and F applications until that event a prudent precaution.

relief sought by the Petition is not the appropriate vehicle for allowing such participation. ICCPCS urges the Commission to provide alternative relief which will allow participation by rural telephone companies in accordance with congressional intent, but will not afford any financial benefits to any entrepreneurs' block applicants which do not meet the Commission's existing criteria for such benefits.

Respectfully submitted,

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